The University of the State of New York

The State Education Department
State Review Officer
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No. 11-114

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Diane da Cunha, Esq., of counsel

Friedman & Moses, LLP, attorneys for respondent, Elisa Hyman, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which found that it failed to offer the student a free appropriate public education (FAPE) from 1996 through 2007 and awarded the student compensatory education services following his graduation from high school. Respondent (the parent) cross-appeals from the impartial hearing officer's decision to the extent that he did not reach or dismissed certain determinations on issues raised in the due process complaint notice. The appeal must be sustained. The cross-appeal must be dismissed.

At the time the impartial hearing convened in April 2010, the student was attending eleventh grade at the Robert Louis Stevenson School (RLS) and was receiving occupational therapy (OT) and speech-language therapy provided by the district (Tr. pp. 118, 1018-19, 1032-33). RLS is a nonpublic school that has not been approved by the Commissioner of Education as a school with which districts may contract to provide special education services for students with disabilities (see 8 NYCRR 200.1[d], 200.7).

Background

As further discussed below, I find that the parent's claims in her January 2010 due process complaint notice regarding the 1996-2007 time period are barred by the two-year statute of limitations period as set forth in the Individuals with Disabilities Education Act (IDEA). However, the student's educational history will be briefly summarized as relevant to provide a context for addressing the statute of limitations.

The hearing record reflects that in or about February 1996, the student was referred for an evaluation to determine whether he was eligible to receive special education and related services as a preschool student with a disability (Tr. pp. 947-49; Dist Exs. 10; 11). As part of that evaluation, a social history, psychological evaluation, speech-language evaluation, an OT evaluation, and a home language survey were conducted (see Dist. Ex. 12; Parent Exs. H; I). The evaluation did not proceed to completion because the parent withdrew her consent to have the student evaluated (Dist. Exs. 24; 25; 26). According to the parent, she decided to home school the student and in September 1997, when he was five years old, the student was enrolled in a pre-kindergarten program at a nonpublic school (Tr. pp. 959, 1043-46; Dist. Ex. 8 at p. 2). The student continued at that school for first and second grade (Dist. Ex. 8 at p. 2).

In October 2000, when the student was in second grade at a nonpublic school, his teacher referred him to the Committee on Special Education (CSE) at the parent's request (Tr. pp. 960, 963-64; Dist. Exs. 13; 28). The district conducted a psychological evaluation of the student on November 21, 2000 and a speech-language evaluation on January 2, 2001 (Parent Exs. A; B). In a meeting on January 8, 2001, the school based support team (SBST) determined that the student was not eligible for special education programs and services and should remain in general education (Dist. Ex. 15). Thereafter, on March 19, 2001, the CSE met and determined that the student was eligible to receive special education and related services as a student with a speech or language impairment (see Dist. Ex. 19; see also Dist. Ex. 18). The March 2001 CSE recommended that the student be placed in a general education setting and receive speech-language therapy (see Dist. Ex. 19).

The student continued to attend the nonpublic school during third and fourth grade and continued to receive speech-language therapy during that time (Tr. pp. 770, 971, 1048-49; Dist. Ex. 8 at pp. 1, 2). The CSE met on May 9, 2003, when the student was in fourth grade (Parent Ex. S at p. 1). The resultant May 2003 individualized education program (IEP) indicated that the student had not been reevaluated for speech-language therapy since January 2001 and advised that a "full assessment of the student's speech-language, articulatory," and "oro-motor" skills was required (Parent Ex. S at p. 3). The May 2003 IEP also recommended that the student's speech-language services continue to be provided at the level and frequency that was then being provided (id. at p. 10). The parent reported that the student's speech-language services were terminated after fourth grade because his speech-language therapist advised her there was nothing more that she could do for the student and that he no longer needed the service (Tr. pp. 971, 976-77, 1049).

The student transferred to a different nonpublic school at the beginning of fifth grade (2003-04) (Tr. pp. 975-76, 1052; Dist. Ex. 8 at p. 2). At the end of February 2004, the parent removed the student from that school and home schooled him until the end of the 2003-04 school year (Tr. p. 978; Dist. Ex. 8 at p. 2). The student attended another nonpublic school for sixth grade (2004-05) and for part of seventh grade (2005-06) (Tr. pp. 978-79, 1054, 1118; Dist. Ex. 8 at p. 2). Midway through seventh grade, the student was accepted into a district program for gifted children, where he remained until the end of eighth grade (2006-07) (Tr. pp. 9811, 1054-55; 1120; Dist. Ex. 8 at p. 2). According to the parent, the student did not have a good experience at this school (see Tr. pp. 985-88, 1056-59; Dist. Ex. 8 at p. 2; Parent Ex. N at pp. 2, 4).

The district conducted a psychoeducational evaluation of the student on December 1, 2006 as part of a three year reevaluation and teacher reports were requested on December 6, 2006, to be returned by December 12, 2006 (Parent Exs. M; P; Q; see Dist. Ex. 30). On December 13, 2006,

the CSE convened and determined that the student should be "decertified with declassification support services," which would include extended time for testing (Parent Ex. T at pp. 1, 2). Although the timing is not clear, the parent testified that she advised the school psychologist that she did not agree that the student did not need any services (Tr. p. 991).

As a result of a referral by the student's private psychiatrist, an individual who represented herself as a clinical psychologist with a doctorate of psychology (Psy. D.) degree and as a "New York Certified School Psychologist," tested the student over four dates between December 30, 2006 and January 15, 2007 (Tr. p. 136; Dist Ex. 1 at p. 3; Parent Ex. N at pp. 1, 10; see Tr. pp. 121-22).[1] A revised comprehensive psychoeducational evaluation was thereafter completed on or about March 9, 2007, which the parent provided to the CSE (Dist. Ex. 1 at pp. 2-15; see also Parent Ex. N). Among other things, the March 9, 2007 report offered diagnoses of the student of a pervasive developmental disorder, not otherwise specified (PDD-NOS) (atypical autism) and a depressive disorder, NOS and stated that "[a]n educational classification of 'Autism' seem[ed] most appropriate" for the student (Dist. Ex. 1 at pp. 2, 11). According to the parent, the private psychiatrist "confirmed these diagnoses" (see Dist. Ex. 5 at p. 2).

By due process complaint notice dated April 23, 2007, the parent requested an impartial hearing and sought reimbursement for the March 2007 private psychoeducational evaluation (Dist. Ex. 1 at p. 1). In June 2007, district staff and the parent learned that the individual who had tested the student and prepared the March 9, 2007 psychoeducational evaluation was not licensed by the New York State Department of Education as a school psychologist as the report had represented (Tr. pp. 93-94, 109-10, 121-22, 143-44). A CSE representative reported that based on this, the district determined that it would not reimburse the parent for the cost of the evaluation and the parent's request was withdrawn (Tr. pp. 94, 96).

By due process complaint notice dated June 20, 2007, the parent, through her attorney, requested an impartial hearing concerning the 2006-07 and 2007-08 school years, alleging that the district had failed to properly evaluate and classify the student, develop an IEP, failed in its "child find obligations," and failed to offer a FAPE to the student (Dist. Ex. 2). The parent requested funding for the student to attend RLS for summer 2007 and for the 2007-08 school year (id. at pp. 1-2). The parent also requested reimbursement for a private evaluation and for private therapy, and requested an order directing the district to reimburse her for therapy services "for the next school year" (id. at p. 2).

An updated social history and a speech-language evaluation were conducted by the district on July 20, 2007 (Dist. Ex. 8; Parent Ex. C). The speech-language evaluation advised that speech-language services were "still warranted" and recommended that the student be provided with speech-language therapy (Parent Ex. C at p. 6). The CSE met on August 27, 2007, and determined that the student was eligible to receive special education and related services as a student with a speech or language impairment (Parent Ex. U at p. 1; see Parent Ex. V at p. 16). The resulting August 2007 IEP recommended a 10-month general education program with speech-language therapy as a related service (Parent Ex. U at pp. 1, 8, 10; see Parent Ex. V at p. 16).

[1] The parent reported that the student began seeing a private psychiatrist because she wanted to obtain clarification regarding the district's December 2006 psychoeducational evaluation and because the student was "cutting school" (Tr. pp. 1068-69; see Parent Ex. M).

The student began attending RLS in September 2007 (ninth grade) (Tr. pp. 118, 1004). In a letter dated September 14, 2007, the parent advised the district that she did not agree with the evaluations conducted by the district and that she believed the district had failed to properly evaluate the student (Dist. Ex. 4).

A private licensed psychologist evaluated the student on three days in January 2008, and prepared a written neuropsychological evaluation (Parent Ex. L). The psychologist recommended, among other things, the provision of "language therapy" focusing on expressive and receptive language processing and pragmatic communication skills, an OT evaluation to assess the student's "marked hypersensitivity to sounds," and "[i]nvolvement in a social skills group in and outside of school to address [the student's] social interaction challenges and improve his social reasoning skills" (id. at pp. 31, 33). The psychologist indicated that the student presented with "a few features consistent with Asperger's Disorder" (id. at p. 29). The parent reported that the private psychologist told her at the time of the evaluation that the student showed "signs of being on the autism spectrum" and also that she received the private neuropsychological report on January 31, 2008 (Tr. p. 125).

By due process complaint notice dated January 18, 2008, the parent, through her attorney, requested an impartial hearing, alleging that the parent notified the district by letter in 2007 that she disagreed with the district's evaluations and requested a private evaluation at district expense (Dist. Ex. 5 at pp. 1,2).[2]

In a report dated February 1, 2008, the student's private psychiatrist provided a diagnosis of a PDD (Parent Ex. J at p. 3).[3] The psychiatrist listed as "sources of information," for his report, among other things, the parents, the July 2007 district speech-language evaluation, the March 2007 revised neuropsychological evaluation, 12 hours of clinical interviews with the student, the January 2008 neuropsychological evaluation, and first and second quarter evaluations from RLS for the 2007-08 school year (id.).

During spring 2008, the district conducted additional evaluations of the student and the district's evaluating psychiatrist offered the student a diagnosis of an autism spectrum disorder (Parent Exs. E; F; K). The student continued to attend RLS for the 2008-09 and 2009-10 school years (Tr. pp. 118, 1004).

Due Process Complaint Notice

By due process complaint notice dated January 25, 2010, the parent requested an impartial hearing and asserted claims against the district pursuant to IDEA, section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. §§ 701-796[l] [1998]), 42 U.S.C. § 1983 (section 1983), and New York State Education Law § 4401 (Parent Ex. Y at p. 1). The parent asserted that the district failed to properly and thoroughly evaluate the student from the time that he was first referred for an evaluation for special education services in 1996 through 2007 because the district never

[2] The parent amended her due process complaint notice on January 23, 2008 (Dist. Ex. 6).

[3] The parent testified that the student stopped seeing the private psychiatrist after she learned that he had been expelled from the American Psychiatric Association (APA) for inappropriate conduct relating to another patient (Tr. pp. 122-23, 136-37, 1069).

identified the student as having Asperger's disorder during this time period (id. at pp. 1-2).[4] The parent further asserted that her claims that the district failed to diagnose the student with Asperger's disorder and provide a FAPE for 1996 through 2007 were not barred by the statute of limitations because she did not learn of the student's diagnosis of Asperger's disorder until she received the January 2008 neuropsychological evaluation and she then timely filed the instant due process complaint notice (id. at p. 3). According to the parent, during the years in question, the district failed to provide her with notice concerning her due process rights that conformed with IDEA criteria and also failed to ensure that she understood her rights regarding the IEP process (id.). The parent also alleged that the district failed to evaluate the student for OT (id.). Among other relief, the parent sought compensatory education services for the student (id.).

Impartial Hearing Officer Decision

On March 15, 2010, the district filed a motion seeking to dismiss the parent's due process complaint notice on the basis that it was barred by the statute of limitations, the equitable doctrine of laches, and collateral estoppel (IHO Ex. I). The district argued that the parent's claim accrued at the latest on March 9, 2007, when the parent's private evaluator provided a psychoeducational evaluation that diagnosed the student with autism (id. at p. 3). According to the district, the parent referred to this diagnosis in three subsequent due process complaint notices that she filed prior to the instant January 25, 2010 complaint (id.). Thus, the district contended that the parent's claims asserted in her January 2010 due process complaint notice were time barred by IDEA's two-year statute of limitations period because the parent knew of the student's autism diagnosis by March 9, 2007 (id.).

The parent filed a response to the district's motion to dismiss dated March 24, 2010 (IHO Ex. II). With respect to the district's statute of limitations defense, the parent contended that the district did not meet its burden to establish the dates on which the parent knew or should have known of the accrual of her claims and even if had met its burden, the parent should then have the opportunity at a hearing to present evidence to demonstrate that "one of the statutory tolling exceptions" applies (id. at pp. 2-3).

On April 7, 2010, the parties proceeded to an impartial hearing and both parties presented oral argument (Tr. pp. 1-81). The district maintained that the parent's claim accrued on March 9, 2007 when the parent received the private psychoeducational evaluation diagnosing the student with autism (Tr. pp. 7-8). The parent contended that the evaluator who prepared the March 9, 2007 report was later determined not to be a licensed school psychologist and that an evidentiary hearing was necessary in order to determine when the parent's claim accrued (Tr. pp. 9-11). On May 10, 2010, the impartial hearing reconvened (Tr. p. 83). The district submitted evidence and both the parent and a district witness testified (Tr. pp. 90-91, 86-160). The impartial hearing officer issued an oral decision finding that the parent's claims were not time barred by the statute of limitations because she was not put on notice until January 31, 2008 when she received the private neuropsychological evaluation advising her of the student's "true diagnosis" (Tr. pp. 129, 162). He further determined that the March 9, 2007 psychological evaluation was "invalidated" and could

4 The parent stated that she was "not challenging the issue of FAPE for the 2007-2008, 2008-2009, or 2009-2010 school years or any other matter resolved through any settlement agreement with [the district] or hearing orders" (Parent Ex. Y at p. 3).

not be relied on by anyone because it was subsequently learned that the individual who had prepared the report was not a licensed psychologist (Tr. p. 102).

The impartial hearing continued on June 22, 2010 and concluded on May 20, 2011, after a total of 13 days of proceedings (1, 83, 175, 273, 391, 443, 614, 655, 745, 921, 1108, 1154, 1219, 1352-57).[5] The impartial hearing officer issued a decision dated August 8, 2011 (IHO Decision at p. 12).[6] In his decision, the impartial hearing officer reiterated that he had orally denied the district's motion to dismiss the parent's claims as time barred at the May 10, 2010 hearing date (id. at pp. 6-8). He explained that the district "discredit[ed]" the March 9, 2007 psychological evaluation when it refused to reimburse the parent for the evaluation after learning that the individual who prepared the report was not a licensed school psychologist; therefore, the district could not assert in 2010 that the report "was valid enough to place the parent on notice that [the student] was on the [autism] spectrum" (id. at p. 7). The impartial hearing officer further determined that the parent was not aware that the district failed to appropriately identify the student as having autism until she received the January 2008 private neuropsychological evaluation that diagnosed the student with Asperger's disorder (id.). The impartial hearing officer further determined that the statute of limitations was therefore tolled and the parent could assert claims back to 1996 (id.).

The impartial hearing officer was not persuaded by the district's assertion that the parent was on notice of its alleged violations because the parent received her due process rights beginning in 1996 (IHO Decision at p. 7). With respect to the district's position that it was "not required to make a diagnosis of 'autism' or anything else on the 'spectrum,'" the impartial hearing officer concluded that this also was unpersuasive because in January 2009, the district found the student eligible for special education programs and related services as a student with autism (id.).

Turning to the merits of the parent's claims, the impartial hearing officer concluded that the district did not sustain its burden to prove that it provided the student with a FAPE from 1996-2007 (IHO Decision at p.8).[7] He further determined that the district's failure to adequately evaluate the student over an 11 year time period resulted in a gross violation of the student's rights under

[5] The hearing record establishes that the impartial hearing officer did not comply with State regulations regarding the granting of extensions in this matter. Both federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may only be granted consistent with regulatory constraints and an impartial hearing officer must ensure that the hearing record includes documentation setting forth the reason for each extension (8 NYCRR200.5[j][5][i]). In this case, the hearing record does not contain written documentation setting forth, consistent with the regulatory criteria, the reasons for granting extension requests (see 8 NYCRR 200.5[j][5][ii], [iii], [iv]).

[6] The impartial hearing officer did not reach the parent's section 504 claims as he stated that "all [of] the relief sought in this matter will fall under the IDEA" (IHO Decision at p. 11). During the November 12, 2010 proceeding, the impartial hearing officer indicated that he was "not hearing the [section] 1983 claims" and during the April 18, 2011 proceedings indicated that he had dismissed those claims (Tr. pp. 446, 939).

[7] The impartial hearing officer declined to find a denial of a FAPE on the basis that the district failed to provide OT services to the student, concluding that the parent's claim for OT services related to 2008, which the parent expressly stated in her due process complaint notice was a school year that was not in issue (IHO Decision at p. 8).

the IDEA (id. at p. 9). As a remedy, among other relief, the impartial hearing officer determined that the student was entitled to compensatory educational services for an additional two years even though the student had graduated from high school in June 2011 and was likely to attend college (id. at pp. 9-10).

Appeal for State-Level Review

The district appeals, alleging that the impartial hearing officer erred in finding that the parent's claims for 1996-2007 were not time barred by the statute of limitations.[8] According to the district, the impartial hearing officer erred by determining that the parent was not on notice that the student had Asperger's disorder until she received the January 2008 private neuropsychological evaluation, and therefore had no notice of the district's alleged failure to identify the student with autism until then. The district asserts that the parent knew or should have known about her claims at several different points during the 1996-2007 time period, beginning with her disagreement with a preliminary private evaluation of the student conducted in 1996, which led the parent to terminate the evaluation process after receiving a parental notice of rights from the district. The district further asserts, among other things, that in 2007, the student's psychiatrist advised the parent that he concurred with the opinion of the individual who had prepared the March 2007 psychoeducational evaluation report with respect to the student's diagnosis of an autism spectrum disorder; that the parent had retained an attorney in 2007 who filed a number of due process complaint notices alleging that the district failed to properly evaluate the student; and that the parent had complained to the district on a number of occasions during 2007-08 that the student had not been properly evaluated. The district also alleges that the parent received notice of her rights at several points during the relevant time period; that the district was prejudiced by the parent's failure to bring her claims in a timely manner; and that allowing claims dating back to 1996 is inconsistent with the IDEA's principle of encouraging prompt resolution of special education claims.

The district further contends that placement, programming, and services under the IDEA are to be based on a student's unique needs and not on a disability classification; that the parent's January 2010 due process complaint notice did not challenge any of the IEPs developed in the years from 1996 to 2007, and that the parent did not show that any alleged procedural violation resulted in a denial of a FAPE to the student. In addition, the district contends that the impartial hearing officer improperly ordered compensatory education for the student as he had graduated from high school and the hearing record did not show that the student had been denied or excluded from educational benefits for a substantial period of time. The district attaches additional evidence to its petition for consideration on appeal.

The parent submits an answer, requesting dismissal of the petition and objecting to the additional evidence proffered by the district and attaches additional documents of her own for consideration on appeal. According to the parent, the district failed to establish that the parent received her procedural safeguards during the relevant time period. The parent further asserts that

[8] I note that this office received some incomplete exhibits with the hearing record as detailed in a letter from the Office of State Review to the parties dated December 15, 2011. This office is still waiting to receive a response from the district regarding these exhibits as instructed in the letter. However, in light of the detailed testimony, documentary evidence, and written motions that are part of the hearing record, I am able to render a decision in this case without the missing pages of exhibits.

the impartial hearing officer correctly found that she did not know nor should have known of her claims against the district until she received the January 2008 private neuropsychological report; therefore, the claims in her January 2010 due process complaint notice were timely. The parent also cross-appeals, among other things, the impartial hearing officer's failure to rule on her section 504 claims and his dismissal of her section 1983 claims.

The district filed a reply objecting to the parent's additional evidence submitted with her answer and claiming that the parent's procedural defenses raised in her answer must fail.[9] The district also filed an answer to the parent's cross-appeal asserting, among other things, that a State Review Officer has no jurisdiction over section 504 claims and that an impartial hearing officer has no jurisdiction over the parent's section 1983 claims; therefore, those claims must be dismissed on appeal.

Discussion

Statute of Limitations

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 C.F.R. § 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir.2003]).[10] An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D][i]; 34 C.F.R. § 300.511[f]; 8 NYCRR 200.5[j][1][i]).

Upon review of the hearing record, I find that the district met its burden of establishing that the parent's claim that the district failed from 1996 to 2007 to diagnose the student with Asperger's disorder accrued more than two years before the parent filed her due process complaint notice and is therefore barred by the statute of limitations. The hearing record indicates that the parent began asserting her disagreement with the district's recommendations at least as early as December 2006

[9] Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Upon review, I find that the additional documentary evidence submitted by the parties either could have been submitted at the time of the impartial hearing, or is documentary evidence that in light of the findings below, is not necessary in order to reach a decision in this case. Accordingly, I will not consider any of the proffered evidence.

[10] I note that New York State has not established a different limitations period.

when the district found the student to be ineligible for special education programs and services (Tr. p. 991; Parent Ex. T). Further, in a March 9, 2007 report, the parent's private evaluator provided a diagnosis of a PDD-NOS (atypical autism) and recommended an educational classification of autism for the student (Dist. Ex. 1 at pp. 2, 11). The parent subsequently sought reimbursement for the March 9, 2007 psychoeducational evaluation from the district (id. at p. 1). In 2007, she also retained an attorney, who filed a due process complaint notice dated June 20, 2007 that expressly referred to the student's recent diagnosis of PDD-NOS (atypical autism) and alleged, among other things, that the district failed to properly evaluate and classify the student (Tr. p. 135; Dist. Ex. 2). Based on the foregoing, I find that the parent knew or should have known of the student's diagnosis of autism at least by March 9, 2007 and consequently the parent's claims asserted in her January 2010 due process complaint notice are barred by the statute of limitations. Although the district did not reimburse the parent for the psychoeducational evaluation because it was later discovered that the evaluator was not a licensed school psychologist, I disagree with the impartial hearing officer's conclusion that this rendered the March 2007 report unreliable for purposes of establishing whether the parent knew or should have known of the student's autism diagnosis, particularly when the hearing record shows that the parent referred to such diagnosis in subsequent due process complaint notices and frequently asserted that the district failed to properly evaluate the student (see James v. Upper Arlington City Sch. Dist., 987 F. Supp. 1017, 1023-24 [S.D.Ohio 1997], aff'd, 228 F.3d 764 [6th Cir. 2000] [statute of limitations barred claim because parents knew that the student had suffered an injury]).

To the extent that the parent argues that her claims either did not accrue until January 2008 when she received the private neuropsychological report or that an exception to the statute of limitations applies because the district misdiagnosed the student, I find this argument unavailing. The parent cites to Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275 (11th Cir. 2008) for the proposition that a claim relating to misdiagnosis cannot accrue until the parent is made aware of the student's "correct" diagnosis. I decline to adopt such an expansive interpretation of the accrual principles or "withholding information" exception to the statute of limitations.

First, the Circuit Court's holding in Draper regarding the permissible scope of a remedy is not nearly as broad as the parent suggests. Draper affirmed a decision rendered by the United States District Court for the Northern District of Georgia which upheld an administrative hearing officer's dismissal of several claims as untimely and determined when certain claims accrued under the IDEA (Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331 [N.D. Ga. 2007]). The District Court held that even though the district failed to timely assess the student, the parent had reason to know of the alleged violations and, consequently, determined that the parents' claims were barred as untimely under the applicable two-year statute of limitations. The District Court in Draper then proceeded to address the remaining timely claims of inadequate assessment of the student that were related to school years that were within two years of the filing of the due process complaint notice (Draper, 480 F. Supp. 2d at 1340-41, 1345, 1349).

Next, assuming for the sake of argument that the parent is correct and that at several points the district did not properly identify all of the student's deficits in all skill areas, it does not follow that the parent had no reason to know of the basis of her complaint due to the district's failure to offer the student a specific diagnosis. Since Draper was decided in the Circuit Court, at least one other Circuit Court has addressed the issue of "diagnosing" a student and placed considerably less weight on identifying the underlying theory or root causes of a student's educational deficits and instead focused on ensuring the parent's equal participation in the process of identifying the

academic skill deficits to be addressed though special education and through the formulation of the student's IEP (Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; see Application of a Student with a Disability, Appeal No. 09-126 ["a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). Federal and State regulations do not require the district to offer the student a "diagnosis;" instead, they require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and information that will enable the student be "involved in and progress in the general education curriculum" (34 C.F.R. § 300.304[b][1]; see 8 NYCRR 200.4[b][1]). For example, as noted by another state-level hearing officer and subsequently upheld by the United States District Court for the Southern District of California in a case involving the adequacy of a diagnosis of an auditory processing disorder, "the fact remains that [a] District is not charged with making a diagnosis of auditory processing disorder. Instead, [the] District's obligation under federal and state law is to assess Student in all areas of suspected disability… and to ascertain Student's needs" M.P. v. Poway Unified Sch. Dist., 2010 WL 2735759, at *6 n.8 [S.D. Cal., Jul. 12, 2010]). Next, the IDEA then establishes that upon considering the information available about the student's needs, a parent will have a significant role in the CSE to develop the student's IEP (Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524 [2008]). The IDEA's implementing regulations further contemplate that parents and districts may also not agree about the qualities or extent of a student's educational deficits and accordingly provide the parents the right to request an independent educational evaluation (IEE) at public expense (34 C.F.R. § 300.502[a], [b]; see 8 NYCRR 200.5[g][1]).

In view of the forgoing, I cannot conclude that claims simply do not accrue because a district fails to timely "diagnose" the student. To hold otherwise would establish the principle that upon assessment of a student the district must essentially achieve a flawless diagnosis of all of the student's possible conditions and fully disclose that assessment and diagnoses to his or her parents before the IDEA statute of limitations becomes applicable to any claims that the district failed to develop appropriate educational programs for the student; however, courts have not generally held the district to such a standard when evaluating the district's procedures for convening a CSE and developing a student's IEP (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 131-32 [2d Cir. 1998] [noting that the IDEA does not require a program to maximize potential or "everything that might be thought desirable by loving parents"]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. 2009]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. 2011] [citing Walczak and noting that an IEP must be likely to produce progress, not regression]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004] [noting that "[w]hile the IDEA requires districts to provide appropriate education to disabled students, this is not necessarily synonymous with offering disabled students the best educational opportunities available"]).

With regard to the exception to the statute of limitations, since Draper was decided, case law interpreting the "withholding of information" exception to the statute of limitations has found the phrase to apply only to the requirement that parents be provided with certain procedural safeguards (C.H. v. Northwest Indep. Sch. Dist.., 2011 WL 4537784, at *7 [E.D. Tex. Sept. 30, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; Tindell v. Evansville-Vanderburgh School Corp., 2011 WL 3273203, at *11 [S.D. Ind. July 29, 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943 [W.D. Tex. 2008]; Evan H. v.

Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *7 [E.D. Pa Nov. 4, 2008]; see 20 U.S.C. § 1415[d]; 34 C.F.R. § 300.504; 8 NYCRR 200.5[f]). Furthermore, I am not persuaded by the parent's assertion that an exception to the limitations period applies because the district failed to provide notices that were sufficient to meet the definitions of prior written notice or procedural safeguards notice under the IDEA (20 U.S.C. § 1415[c][1], [d][2]; see 34 C.F.R. §§ 300.503[b]; 300.504[c]). If the parent is aware of his or her rights in developing a student's educational program, it has been held that the failure to provide the procedural safeguards notice does not under all circumstances prevent the parent from requesting an impartial hearing (R.B., 2011 WL 4375694, at *7; El Paso Indep. Sch. Dist., 567 F. Supp. 2d at 945; see Application of a Child with a Disability, Appeal No. 07-116). In this case, although copies of the procedural safeguard notices are not included in the hearing record, the hearing record indicates that the district provided—and that the parent executed statements acknowledging her receipt of—her due process rights multiple times covering the time period at issue, beginning in 1996, and that she filed multiple due process complaint notices prior to the instant January 2010 due process complaint notice (see Dist. Exs. 1-2; 5-7; 10-11; 13-15; 18-21; 23; Parent Ex. V at pp. 14, 16, 17, 18). Moreover, the parent testified that she received a copy of her procedural safeguards in December 2006, after the district's psychologist conducted an evaluation of the student, and also that she received both a notice of her due process rights and a copy of her procedural safeguards on July 20, 2007, during her social history update meeting with a district social worker (Tr. pp. 133-34, 135). Accordingly, I find that the evidence supports the conclusion that the parent was not prevented from timely requesting the instant due process proceeding on the basis that the district did not provide her with required procedural safeguard notices.

In sum, under these circumstances, permitting revival of otherwise stale claims on the basis of a diagnosis, without more, does not comport with the IDEA's goal of quickly and efficiently resolving disputes between parents and school districts (Sellers v. School Bd. of City of Mannassas, Va., 141 F.3d 524, 527-28 [4th Cir. 1998]). Thus, the parent's claims are barred by the statute of limitations.

Compensatory Education

The impartial hearing officer concluded that the student was entitled to and should be provided with compensatory educational services for an additional two years beyond the date of his high school graduation (IHO Decision at pp. 9-11). Although not necessary to address in this decision as I have found that the statute of limitations bars the parent's claims, I note that even had the parent's claims been timely filed, the Second Circuit has recently reaffirmed that unless the district committed a "gross procedural violation" of the IDEA resulting in "the student's complete deprivation of a FAPE," the student would not be entitled to compensatory education for those years (French v. New York State Dep't of Educ., 2011 WL 5222856, at *2 -*3 [2d Cir. Nov. 3, 2011; see Somoza, 538 F.3d at 109; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]). In addition, given the fact that graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit (Pascoe v. Washington Cent. Sch. Dist., 1998 WL 684583 [S.D.N.Y. 1998]; Application of the Bd. of Educ., Appeal No. 05-037; see also Bd. of Educ. v. Rowley, 458 U.S. 176, 207 n.28 [1982]; Walczak, 142 F.3d at 130 [noting that "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress" under the IDEA]), the receipt of which terminates a student's entitlement to a FAPE (34 C.F.R. § 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; 200.4[i]; but see, 8 NYCRR 200.4[c][5] [noting that a student may still remain

eligible for special education services even though he has advanced from grade to grade]), when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility in order for the student to qualify for an award of compensatory education (see Garro v. State of Connecticut, 23 F.3d 734, 737 [2d Cir. 1994]; Mrs. C., 916 F.2d at 75), it would appear that it would be the rare case where a student graduates with a Regents or local high school diploma and yet still qualifies for an award of compensatory education (see, e.g., J.B. v. Killingly Bd. of Educ., 990 F. Supp. 57 [D. Conn. 1997] [where student apparently graduated and received diploma prior to the district establishing the appropriate graduation requirements, court decided student had established a prima facie case of likelihood of success on the merits on a possible award of continued compensatory education]; Application of a Child with a Disability, Appeal No. 05-089; Application of the Bd. of Educ., Appeal No. 05-037).

Conclusion

I have considered the parties' remaining contentions, including those raised in the parent's cross-appeal, and find that I need not reach them in light of my conclusion above that the parent's claims are barred by the statute of limitations.[11]

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the impartial hearing officer's decision dated August 8, 2011 is hereby annulled.

Dated: **Albany, New York**
December 23, 2011

STEPHANIE DEYOE
STATE REVIEW OFFICER

[11] See Application of the Bd. of Educ., Appeal No. 11-122 (stating that New York State Education Law makes no provision for state-level administrative review of hearing officer decisions in section 504 hearings and a State Review Officer does not review section 504 claims); Application of a Student with a Disability, Appeal No. 11-121 (stating that regarding the parents' section 1983 claims, due to the limited scope of an impartial hearing under the IDEA, the parents' claims would be reviewed to the extent that they asserted violations of the IDEA and State regulations).